No. 08-1065

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In The Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA,
JOSEPH HRVOL, AND DAVID RICHTER,
Petitioners,

v.

TERRY J. HARRINGTON
AND CURTIS W. McGHEE JR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTION PRESENTED

Whether a prosecutor may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly (1) violated a criminal defendant's "substantive due process" rights by procuring false testimony during the criminal investigation, and then (2) introduced that same testimony against the criminal defendant at trial.

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STATEMENT OF THE CASE

During the night of July 21, 1977, retired police officer John Schweer was killed while serving as a night watchman for several car dealerships in Council Bluffs, Iowa. His body was discovered the next morning with a 12-gauge shotgun wound to the chest. A 12-gauge shotgun shell was found at one of the dealerships, and there were footprints and paw prints near Schweer's body.

Schweer had retired from the police force less than a month before, and the police and prosecutors treated his murder like that of an officer. Petitioner David Richter was the Pottawattamie County Attorney at the time. Richter had been appointed County Attorney in 1976 and was to face the voters for the first time in 1978. McGhee CA8 App. 268. Richter confronted the daunting prospect of "campaigning in the face of Schweer's unsolved murder." Pet. App. 4a. Contemporaneous police reports confirm that Richter and Assistant County Attorney Joseph Hrvol actively participated in the murder investigation from its earliest stages, interviewing witnesses and doing ordinary police work. *See* J.A. 21-53; *see also* J.A. 56. Although not yet assigned the responsibility of prosecuting the case, Hrvol was "intensely involved" in the investigation from the beginning. *See* J.A. 56-58.

1. Early in the investigation, the prosecutors and police had more than a dozen suspects. J.A. 58. Neither respondent was among them. J.A. 58. Instead, in light of the crime-scene evidence, suspicion began to focus on a man who had been

seen walking a dog and carrying a shotgun near the dealerships in the days before the murder. The day after the murder, a police officer found shoe and paw prints west of the crime scene that were similar in type and size to those found at the scene. The investigators also learned that Schweer had chased a man with a dog and a rifle from one of the car lots the night before his murder. J.A. 42-43, 47-48.

Following these leads, Richter interviewed James Burke three days after the murder. J.A. 21-22, 63. Burke told Richter that he had seen a man with a shotgun and a dog running west of the crime scene two nights before the murder. J.A. 20-21, 34-36. Later, Richter interviewed David Waide about "subjects observed walking dogs in the South section of town." J.A. 23-24; *see also* J.A. 60. Waide said he had seen a man walking a dog near the crime scene during the evening hours in the days before the murder. Waide identified the man with the dog as Charles Gates. J.A. 24.

Investigators questioned Gates and even gave him a polygraph test. *See* J.A. 26-27. During the polygraph test, Gates denied owning a shotgun and shooting Schweer. *Id.* According to the written opinion analyzing the polygraph results, Gates's denials were "not truthful." J.A. 27. Petitioners received copies of the Gates polygraph report. *See* J.A. 63.

With suspicion fixed on Gates, Hrvol and a police officer canvassed the neighborhood near the crime scene, asking people whether they had seen any men walking dogs. *See* J.A. 49-53, 57. One

person said she had seen a man wearing overalls and a hat who was "always in the company of dogs." J.A. 49. The police report states that this was a "perfect description" of Gates. J.A. 50. Several others provided consistent descriptions. J.A. 50-52.

Investigators discovered that Omaha police suspected Gates in an unsolved 1963 murder. J.A. 26-27. A Council Bluffs police officer visited the Omaha address listed on Gates's driver's license and spoke to his former landlords and neighbors.[1] J.A. 28-33. They described him as a "spooky type individual" with three dogs that he walked "constantly." J.A. 28-29. One reported seeing Gates with a gun holster around his waist. J.A. 29-30. His former landlord found spent .38 caliber rounds and some extremely odd personal effects after Gates moved out. J.A. 32.

Richter and Hrvol were so focused on Gates that they took the rather extraordinary step of personally consulting with an astrologer about whether Gates committed the murder. J.A. 37-41. The police report documenting the meeting describes Gates as "our suspect in this matter." J.A. 40. After the prosecutors gave the astrologer Gates's date of birth, she "made a short astrological chart" and used the chart to describe Gates's supposed personality to the prosecutors. J.A. 40; *see also* J.A. 60. The astrologer promised to work

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[1] Council Bluffs is an almost-exclusively white suburb of Omaha, Nebraska. The crime scene is less than ten miles from downtown Omaha.

on more charts and to contact the County Attorney's Office with the results. J.A. 40-41.

2. Despite the substantial circumstantial evidence pointing to Gates, investigatory interest shifted away from Gates and toward a group of African-American teenagers thought to be part of a car-theft ring. On Schweer's first night as watchman, an Oldsmobile Cutlass was stolen. Appellants' CA8 App. 149. That car was recovered in Omaha on September 5, 1977. That same day, Council Bluffs police received reports that two cars had been stolen from dealerships in Fremont, Nebraska. Appellants' CA8 App. 90-93. Several days later, Nebraska police picked up three teenagers in one of the stolen Fremont cars. Appellants' CA8 App. 90, 153. One of the teenagers was Kevin Hughes, who at the age of sixteen already had sixteen arrests to his name.

When questioned by Fremont police, Hughes denied having stolen the car. Instead, he said three others—respondents Harrington and McGhee and Anthony Houston—had stolen the cars from the Fremont dealerships and the Cutlass from Council Bluffs. Appellants' CA8 App. 163. Upon hearing this information, the Nebraska authorities contacted the Council Bluffs police and told them that Hughes might have information regarding the Schweer murder. *See* Pet. App. 29a.

Council Bluffs detectives interviewed Hughes in Nebraska and told him that they knew he was responsible for the Schweer murder. However, if Hughes agreed to help the detectives solve the murder, the detectives said they would not charge

Hughes with the murder, they would help him with his numerous other pending charges, and he might receive a $5000 reward. Pet. App. 29a; J.A. 65.

Hughes initially gave a written statement that a "light skinned man," later identified as Steven Frazier, had murdered Schweer. Hughes said Frazier claimed to have killed a security guard while stealing a Lincoln Continental in Council Bluffs. Hughes was lying, and the authorities knew it: no Lincoln had been stolen. Pet. App. 29a-30a.

Hughes tried again and lied again. Hughes implicated Arnold Kelly. The authorities quickly learned that this was a lie: Kelly had been in Kansas City with the Job Corps at the time of the murder. Pet. App. 30a.

With Hughes's first two stories rejected as lies, Hughes turned to implicating Harrington, McGhee, and Houston. Hughes initially said he did not believe that Harrington, McGhee, or Houston was capable of murder. McGhee Dist. Ct. Supp. App. 328. But on September 30, 1977, Hughes gave a written statement relating that Harrington had told him that he killed Schweer with help from Houston and McGhee. Appellants' CA8 App. 183-84. This was clearly a lie: when Hughes was given a polygraph, he failed it and admitted his lie. Appellants' CA8 App. 178.

Undeterred, Hughes wrote out another statement. This time, Hughes claimed that he was near the crime scene when the murder occurred. According to his statement, Hughes waited in the car while Harrington, McGhee, and Houston killed

Schweer. Hughes claimed to have heard a shot and seen the others running back to the car from behind one of the dealerships. Appellants' CA8 App. 185-86. The Omaha police took Hughes to the crime scene to allow him to point out the activities he described. The Council Bluffs police met Hughes at the scene. When Hughes returned to Omaha from the crime scene, the Omaha police tape-recorded Hughes's statement. Appellants' CA8 App. 178. With Hughes's latest statement on tape, the Council Bluffs detectives and petitioner Hrvol went to Omaha and interviewed Hughes for two hours. Appellants' CA8 App. 179.

Petitioners and the detectives knew about Hughes's lies and inconsistencies. *See* J.A. 63. In addition to repeatedly lying about the identity of the murderer(s), failing the polygraph, and admitting his lies, Hughes had been demonstrably wrong about critical information. Hughes said the murder weapon was a pistol and then a 20-gauge shotgun. Appellants' CA8 App. 95. He was lying, and the authorities knew it: Schweer was killed with a 12-gauge shotgun. Hughes's September 30, 1977 statement placed the murder behind McIntyre Oldsmobile. Appellants' CA8 App. 185. Hughes was lying, and the authorities knew it: the murder occurred on the railroad tracks near O'Neill Datsun, down the street and on the opposite side of 32nd Avenue from McIntyre Oldsmobile. McGhee CA8 App. 69-72.

3. Neither the prosecutors nor the detectives considered Hughes a reliable witness. *See* J.A. 63. His September 30, 1977 statement was riddled with mistakes and clearly was insufficient for

probable cause. But the prosecutors and detectives determined to use Hughes anyway and to buttress his story enough to arrest Harrington and McGhee for the murder. They reminded Hughes that he would probably be charged with the murder if he did not cooperate. *See* J.A. 60-61. They falsely told him that Harrington and McGhee had signed statements accusing him of the murder that would be used against him if he did not continue to implicate them. Hrvol then offered Hughes the $5000 reward money in exchange for his false testimony. J.A. 65. After these threats and inducements, Hughes became much more cooperative. J.A. 61.

As they had from the earliest stages of the investigation, petitioners continued to work side-by-side with the Council Bluffs detectives in investigating the murder. J.A. 62. Richter and Hrvol received copies of all of the police reports, J.A. 59, 63, Hrvol attended practically every meeting with Hughes, J.A. 60, and Hrvol kept Richter apprised of the investigation, J.A. 59.

No evidence corroborated Hughes's account, so his story would have to bear the entire weight of his accusations against Harrington and McGhee. When Hrvol and the detectives interviewed Houston (whom Hughes had said participated in the murder), Houston told them he had been in jail at the time. Appellants' CA8 App. 215. The investigators confirmed this fact and confronted Hughes with it. Hughes admitted lying again and immediately changed his story to eliminate Houston and implicate only Harrington and McGhee. Appellants' CA8 App. 216.

To fill in the story's other obvious holes, the investigators—including Hrvol—took Hughes to the crime scene four or five times. J.A. 64. During those sessions, they provided Hughes with the known facts about the murder and helped him keep his story straight. J.A. 64. Hughes later testified that he never had any personal knowledge regarding Schweer's death—his only knowledge was fed to him by the police and the prosecutors. J.A. 64. (Indeed, petitioners so admit. J.A. 64, 74.) Hughes followed the cues given by the police and the prosecutors, correcting previous verifiable inaccuracies in his testimony. For example, after he learned that a 12-gauge shotgun shell was found at the scene, Hughes corrected his earlier statements that a pistol or 20-gauge shotgun was the murder weapon. In addition, after the walk-through sessions at the crime scene, Hughes changed his story to account for the location of Schweer's body, correcting his earlier statement that put the murder behind the wrong car dealership and away from the railroad tracks.

Thus, petitioners used Hughes as their mouthpiece to fabricate a phony case against Harrington and McGhee. They focused exclusively on Harrington and McGhee once they discovered Hughes's willingness to fabricate "eye-witness" testimony. Gates—the white brother-in-law of a Council Bluffs Fire Department captain, Pet. App. 26a—had been petitioners' "suspect in this matter," J.A. 40, and there was a strong circumstantial case against him. But rather than rely on circumstantial—but real—evidence, petitioners determined to use Hughes to frame Harrington and

McGhee—two African-American teenagers from across the state line.

In addition to shoring up Hughes's account, Hrvol and the detectives pressured Hughes's friends to corroborate aspects of his story. *See* J.A. 68-69. Hughes said Harrington and McGhee had picked him up on the night of the murder. The investigators met with Hughes's girlfriend, Candace Pride, who was in the stolen Fremont car with Hughes (and a friend named Roderick Jones) when the police stopped them. The investigators told Pride that Hughes would be charged with murder unless she said Harrington and McGhee had picked him up on the night of the murder. Pride signed a false statement to that effect. Pet. App. 34a. After the investigators placed Jones in a room with Hughes, Jones gave a false statement that he was with Hughes when Harrington and McGhee picked him up on the night of the murder. Pet. App. 33a. The investigators also questioned Clyde Jacobs—sometimes in the same room with Jones and Pride. Jacobs too falsely stated that Harrington and McGhee had picked Hughes up on the night of the murder. *See* J.A. 68. All these teenagers were told that they would go to jail if they did not corroborate Hughes's story. J.A. 68-69.

4. After spending more than a month fabricating evidence to frame Harrington and McGhee, petitioners followed through with their plan and used the fabricated evidence to arrest Harrington and McGhee and charge them with the Schweer murder. Immediately after the police and prosecutors had taken Hughes to the crime scene

on November 16, 1977, Richter took Hughes's sworn statement. J.A. 65. On November 16 and 17, 1977 preliminary informations signed by a detective and approved by Richter and Hrvol were filed. *See* J.A. 67. Harrington and McGhee were immediately arrested, and on February 17, 1978, a True Information was filed formally charging McGhee with first-degree murder. Pet. App. 36a. (A True Information charging Harrington with first-degree murder was not filed until May 8, 1978. Appellants' CA8 App. 245-67.)

With McGhee's trial looming, the investigators—including Hrvol—took additional steps to strengthen Hughes's false account. They contacted jailhouse informants about providing false testimony that would incriminate Harrington and McGhee. Promising leniency or favorable prison assignments, the detectives and Hrvol elicited three false statements from jailhouse informants. *See* J.A. 69-70.

Hughes's fabricated story was the centerpiece of the State's case at McGhee's trial. Besides Hughes, the State's witnesses included the two teenagers arrested with Hughes in the stolen car (his girlfriend Pride and Jones), Hughes's other girlfriend Linda Lee, Hughes's friend Jacobs, and the jailhouse informants. Hrvol presented the fabricated evidence through Hughes and these "corroborating" witnesses. Richter examined only two peripheral witnesses for the State and did not present any fabricated evidence.

McGhee was convicted of first-degree murder on May 11, 1978 and sentenced to life imprisonment

without parole. Harrington was convicted of first-degree murder on August 4, 1978 based on the same fabricated evidence and received an identical sentence. At sentencing, Harrington maintained his innocence:

> I just want you to know that no matter what happens, I know I'm innocent, and as long as, you know, I feel that inside, then I'm going to keep on fighting because I know I can't see myself locked up for the rest of my life for something I didn't do. . . . I feel like I was judged by the color of my skin and not the content of my character, and I'll always feel that way until I get, you know, the kind of verdict the testimony shows, and that's innocent or not guilty as they would say in the courtroom.

Harrington v. State, 659 N.W.2d 509, 523 n.10 (Iowa 2003).

5. Harrington and McGhee had spent nearly 20 years in prison when a barber at the Iowa State Penitentiary where Harrington was imprisoned requested and received a copy of the Council Bluffs Police Department's complete file on the Schweer murder. That file contained numerous police reports that documented the evidence pointing to Gates and the early investigative focus on him. *See* J.A. 21-53. None of those reports had been provided to Harrington or McGhee or their counsel. In fact, in the course of testifying and responding to formal requests in proceedings since the 1978 convictions, the prosecutors and detectives had repeatedly and falsely denied that there were any

suspects other than Harrington or McGhee and maintained that the "man and a dog" (*i.e.*, Gates) was "never found or identified." *E.g.*, J.A. 58-59.[2]

Harrington filed a new post-conviction relief petition in state court in 2001, based in part on the wrongfully-withheld police reports. The trial court denied relief, but the Iowa Supreme Court reversed, holding that petitioners had violated Harrington's due process rights by not disclosing material, exculpatory evidence. *See Harrington*, 659 N.W.2d at 525. Noting that "Hughes, the primary witness against Harrington, was by all accounts a liar and a perjurer," the Supreme Court vacated Harrington's conviction and granted him a new trial. *Id.* at 524. McGhee petitioned for a new trial based on that decision.

6. After the Iowa Supreme Court's decision, then-Pottawattamie County Attorney Matthew Wilber had to decide whether to retry Harrington and whether to oppose McGhee's new-trial petition. Wilber viewed Hughes as the linchpin of the State's case because he was the only person who placed Harrington or McGhee at the crime scene. *See* Pet. App. 39a. However, Hughes had admitted under oath in 2000 that his 1978 trial testimony against Harrington and McGhee was false. McGhee CA8 App. 223-27. Wilber did not find the jailhouse informants credible. Pet. App. 39a-42a. Wilber nonetheless decided to retry respondents.

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[2] In addition, petitioners did not disclose their agreement to drop an auto-theft charge against Hughes in exchange for his testimony or the deals they made to secure the false testimony of the jailhouse informants. J.A. 61, 67; Pet. App. 37a.

In an attempt to get McGhee to implicate Harrington, Wilber lied to McGhee's lawyer. Pet. App. 41a-43a. For example, Wilber falsely told McGhee's lawyer that Gates had passed the 1977 polygraph and that his investigation had eliminated Gates as a suspect. Pet. App. 42a. Anxious to be released from prison after almost 26 years of wrongful incarceration, McGhee maintained his innocence and denied any knowledge of the Schweer murder but agreed to an *Alford* plea to second-degree murder and a sentence of 25 years with credit for time served. McGhee was released on bond on September 2, 2003, and his plea hearing was scheduled for October 24, 2003.

On October 23, 2003, with Wilber present, Hughes reaffirmed at a deposition in Harrington's case that his 1978 testimony was false. Pet. App. 44a. Wilber knew that Hughes's testimony eviscerated the case against Harrington and eliminated any factual basis for McGhee's plea. Neither McGhee nor his counsel was present for Hughes's deposition. Pet. App. 44a. The next day, with full knowledge that he lacked a case against McGhee, Wilber nonetheless offered the minutes of Hughes's 1978 testimony as the factual basis for McGhee's plea. Pet. App. 44a. A few hours after the court accepted McGhee's plea, Wilber dismissed the case against Harrington and he was released. The district court subsequently found that Wilber procured McGhee's plea through fraud. *McGhee v. Pottawattamie County*, No. 4:05-cv-00255, slip op. at 16 (S.D. Iowa Feb. 6, 2007).

7. In 2005, Harrington and McGhee brought civil-rights suits against Pottawattamie County, the city of Council Bluffs, the Council Bluffs police investigators, and given their central role during the investigative stage of the case, petitioners Richter and Hrvol. Relying on 42 U.S.C. § 1983, the complaints alleged that the defendants violated (*inter alia*) the Fourteenth Amendment by fabricating evidence against Harrington and McGhee in order to frame them and deprive them of their liberty for over 25 years. Respondents also alleged that petitioners and the other defendants conspired to deprive them of the equal protection of the laws because of their race in violation of 42 U.S.C. § 1985(3). Each complaint contained nearly 50 pages of detailed factual allegations against petitioners Richter and Hrvol and the other defendants. The cases were consolidated.[3]

After answering, petitioners moved for summary judgment on immunity grounds. Harrington submitted a detailed Statement of Additional Material Facts that Preclude Summary Judgment. J.A. 55-71. Petitioners took the trouble to quibble with three of the 77 paragraphs, admitting them "with qualification." J.A. 73-74. The remaining 74 paragraphs set out extensive evidence of egregious misconduct, and petitioners admitted them in full and without qualification.[4]

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[3] The complaints also include state-law claims that are not at issue in this Court. In addition, Wilber is a defendant in McGhee's case but not a petitioner here.

[4] The district court found these admissions binding only for purposes of the summary judgment motions whose denial is before this Court. J.A. 77-82.

Petitioners' admissions demonstrate that they engaged in extensive police-type investigative work from the earliest stages of the Schweer murder investigation. For example, petitioners admit:

> Richter and Hrvol worked side-by-side with police officers during the investigation, participating in witness interviews before any arrests were made. J.A. 57, 62-63, 73.
>
> Richter personally interviewed two witnesses (Burke and Waide) who had seen Gates walking a dog and carrying a shotgun near the murder scene. J.A. 60-63, 73.
>
> Hrvol joined police practically every time Hughes was interviewed before charges were filed. J.A. 59-60, 73.

Petitioners' admissions also reveal shocking misconduct in fabricating evidence to frame respondents. For example:

> Hughes had "no personal knowledge regarding Schweer's death—the only knowledge he received came from police and prosecutors." J.A. 64, 74.
>
> In four or five trips to the murder scene, police and prosecutors fed Hughes "the details of his testimony so he could keep his story straight." J.A. 64, 74.
>
> Hrvol told an informant to lie that McGhee had confessed in jail. J.A. 69, 74.
>
> Police and prosecutors pressured Hughes's friends—Jacobs, Pride, and Jones—to

provide false testimony to corroborate Hughes's story. J.A. 68-69, 74.

8. Taking these facts as true, the district court held that petitioners were not entitled to absolute immunity for the fabrication of evidence against respondents. *See* Pet. App. 83a. Because "any inculpatory evidence against Harrington and McGhee was plagued with inconsistencies, incompleteness, and verifiable lies," Pet. App. 81a, the court concluded that probable cause to arrest Harrington and McGhee was lacking "at all stages of the proceedings prior to trial," Pet. App. 73a. Nonetheless, the court viewed *Imbler v. Pachtman*, 424 U.S. 409 (1976), as providing petitioners with absolute immunity for misconduct after the filing of McGhee's True Information. Pet. App. 78a. Before that point, the court found that Hrvol and Richter "were acting in an investigatory capacity rather than an advocatory capacity." Pet. App. 81a. Applying the functional test for absolute immunity mandated by *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993), the court held that absolute immunity did not shield petitioners for their investigative conduct before charges were filed. Pet. App. 83a. The court further found that such misconduct "could be viewed as causatively violating the Plaintiffs' rights to a fair trial." Pet. App. 83a. Referring to the numerous undisputed statements of fact showing that petitioners and the police defendants "acted jointly with an intent to wrongfully convict the Plaintiffs for a crime they did not commit," the court held that its conclusion that petitioners lacked absolute immunity applied equally to the § 1985(3) claims. Pet. App. 90a.

The court also held that petitioners were not entitled to qualified immunity. The court first held that "the prosecutors' alleged fabrication/coercion of evidence caused the Plaintiffs' deprivation of liberty by denying them due process." Pet. App. 112a. The court further held that fabricating evidence to convict an innocent person was clearly established to be unconstitutional at the time of petitioners' misconduct, and indeed many decades earlier. Pet. App. 114a (citing, *e.g.*, *Mooney v. Holohan*, 294 U.S. 103 (1935) (per curiam)).

8. On petitioners' interlocutory appeal, the Eighth Circuit affirmed in relevant part. Pet. App. 1a-20a. Because respondents challenged petitioners' conduct at the investigative stage and immunity is absolute only for distinctively prosecutorial functions, the court of appeals held that petitioners were not entitled to absolute immunity. Pet. App. 19a. The court of appeals also affirmed the district court's qualified immunity ruling. Pet. App. 19a. The court of appeals stated that "immunity does not extend to the actions of a County Attorney who violates a person's substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence before filing formal charges." Pet. App. 19a.

SUMMARY OF ARGUMENT

Petitioners engaged in truly unconscionable investigatory misconduct—abandoning their pursuit of the real suspect and framing two innocent citizens for a crime they did not commit. Petitioners are immune only if the Constitution is not offended by their horrific pre-trial misconduct

or if prosecutors, but not the police, enjoy absolute immunity for investigatory misconduct before probable cause attaches. Fortunately, neither proposition is true.

The Constitution is not indifferent to petitioners' pre-trial misconduct. When law enforcement officers fabricate evidence with an intent to use it to deprive innocent citizens of their liberty, they violate the Constitution. While that conduct will often lead to a subsequent violation of the defendant's trial rights, the Constitution is offended much earlier when investigators fabricate evidence, not to put it in a drawer, but to frame innocent citizens.

And neither the constitutional violation nor any claim to immunity depends on the job title of the state actor who engages in the investigatory misconduct. This Court has heard and rejected the argument that prosecutors are shielded by absolute immunity when they engage in investigatory functions normally performed by police officers before probable cause attaches. *See Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

Buckley also makes clear that the involvement of at least one of the petitioners in the subsequent constitutional violation of introducing the fabricated evidence at trial—an unconstitutional action shielded by absolute immunity—does not somehow wash back and launder the earlier misconduct. This proposition is both a necessary corollary of the functional approach to absolute immunity and demanded by common sense. If a police officer who dupes an unknowing prosecutor

into introducing fabricated evidence violates the Constitution, then a prosecutor who fabricates evidence before probable cause attaches and knows that he has no one left to dupe but himself is hardly less culpable or more entitled to immunity. Nor can petitioners achieve the same result by contending that the absolutely immune act breaks the chain of causation. That contention is inconsistent with *Buckley* and a host of decisions that deny absolute immunity to actions that are inextricably intertwined with actions that are absolutely immune.

Finally, considerations of sound policy demand a rejection of petitioners' claims to immunity. There is no sound reason prosecutors need greater immunity than the police when they perform traditional police work. Any notion that prosecutors face greater professional sanctions than police officers is simply wrong. And while petitioners express concerns about a flood of similar claims, one sincerely hopes that the misconduct here is far from commonplace. Neither police officers generally nor prosecutors in the Second Circuit faced a torrent of these claims, even before *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). In *Iqbal*'s wake, few plaintiffs will be able to allege the kind of extreme misconduct with the type of rich detail provided in the complaints here. Moreover, while policy considerations clearly support denying absolute immunity, what ultimately matters is Congress's intent. The misconduct involved here—the framing of innocent African-American citizens for a crime they did not commit—lies at the core of what Congress sought to prevent in the Civil

Rights statutes. It is unfathomable that the Reconstruction Congress would somehow silently have provided immunity for this kind of misconduct.

ARGUMENT

This case comes to the Court on the premise that petitioners fabricated evidence against two innocent citizens in order to frame them for a murder that petitioners knew they did not commit. This constitutes the most egregious breach of public trust and resulting deprivation imaginable. The line that separates aggressive law enforcement from impermissible conduct lies several standard deviations removed from the conduct at issue here. Any student of our constitutional history would conclude that petitioners' conduct was manifestly unconstitutional and that § 1983 was enacted precisely to provide a remedy for such egregious misconduct. Petitioners suggest that this is not so.

Petitioners' startling claim rests on two propositions: (1) until probable cause attaches, the Constitution is indifferent to the deliberate framing of innocent individuals by police officers and prosecutors; and/or (2) prosecutors, but not police officers, are absolutely immune for such misconduct even though it was done in a pre-trial investigatory capacity. The first proposition is unthinkable. The second is squarely foreclosed by *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

I. FABRICATING EVIDENCE TO DEPRIVE A PERSON OF LIBERTY VIOLATES THE DUE PROCESS CLAUSE AND IS NOT SUBJECT TO ABSOLUTE IMMUNITY

Petitioners are simply wrong in contending that the Constitution is indifferent to the egregious pre-trial misconduct in this case. This Court has long held that the Due Process Clause protects citizens against misconduct that is so ill-motivated and unjustifiable as to shock the conscience. This Court has held, for example, that pumping a suspect's stomach violates the guarantee of due process. *Rochin v. California*, 342 U.S. 165, 174 (1952). Such misconduct pales in comparison to what is at issue here.[5] This Court long ago held that the deliberate use of false testimony violates the Due Process Clause. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (per curiam).[6] Petitioners and their co-defendants nonetheless conspired long before probable cause attached, despite a known suspect and knowing respondents to be innocent, to fabricate evidence to frame respondents for murder. Rather than mount a circumstantial case against the prime suspect, petitioners decided to fabricate an entirely false case against two African-American

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[5] The Solicitor General labels the conduct at issue "execrable," SG Br. 4, and "unconscionable," *id.* at 8, but concludes that it fails to shock the conscience, *id.* at 17. It is not clear how as a matter of logic or linguistics the Solicitor General can have it both ways.

[6] While the precise boundaries between substantive and procedural due process can be elusive, *compare In re Winship*, 397 U.S. 358, 362 (1970), *with id.* at 377, 382 (Black, J., dissenting); *see also Honda Motor Co. v. Oberg*, 512 U.S. 415, 435-36 (1994) (Scalia, J., concurring), the distinction is ultimately beside the point here. The pre-trial misconduct here both shocks the conscience and was designed to subvert all the procedural protections afforded suspects and defendants. It strikes at the heart of the due process guarantee.

youths from across the state line. The fabricated case, of course, was not dependent on circumstantial evidence or the product of real investigative work. Instead, an eye-witness co-perpetrator present at the crime scene was fabricated out of whole cloth. The evidence was fabricated, not to put it in a drawer and leave it there, but to use it to frame respondents and deprive them of their liberty. Petitioners' position that the Constitution permits such extraordinary misconduct and absolute immunity shields it has never been, and cannot be, the law.

A. Petitioners Fabricated Evidence Against Harrington And McGhee For The Purpose Of Depriving Them Of Their Liberty

Petitioners cannot dispute at this stage that they engaged in the unconscionable conduct. Indeed, the specific misconduct that they have admitted as undisputed for summary judgment purposes is breathtaking. *See* pp. 14-16, *supra*. Accordingly, petitioners are forced to argue that their pre-trial fabrication did not violate the Due Process Clause. Petitioners' attempt to isolate the fabrication of the evidence from its intended result—the deprivation of respondents' liberty—ignores the facts of this case and the nature of their misconduct. Richter and Hrvol did not fabricate evidence to put it "in a drawer" or "h[a]ng it on the wall" and leave it there. *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994). Fabricated evidence has little to recommend it as a wall hanging but is quite useful in framing innocent individuals, and that is precisely how it was used

here. Nor is there any doubt as to the identity of the victims of the misconduct. Petitioners fabricated evidence, not in some abstract sense, but against respondents. Petitioners pressured Hughes, not to provide information generally, but specifically to implicate Harrington and McGhee. Even after Hughes said that respondents were not capable of murder, and even after Hughes's repeated lies were revealed, petitioners stuck to their plan to use Hughes to target respondents.

Indeed, the nature of the misconduct here—the fabrication of evidence against an already-identified target—exposes hypotheticals about putting fabricated evidence "in a drawer" as utterly unrealistic. Fabrication is different from an attempt to coerce truthful information in this regard. Perhaps prosecutors or police officers could seek to coerce truthful information without intending to use that information against any particular identified individual. Fabrication of false evidence to frame someone does not work that way. The victim of the fabrication is pre-ordained.

It was not coincidence that the evidence that petitioners fabricated against Harrington and McGhee was used against them to deprive them of their liberty—that was the whole point of the fabrication. To analyze the fabrication in the abstract, as if petitioners fabricated the evidence as part of an academic exercise as opposed to as a means to frame respondents for a crime they did not commit, blinks reality, to say the least. Such an analysis also would fail to give effect to the undisputed evidence, which makes crystal clear that the fabrication was part and parcel of

petitioners' and their co-defendants' successful scheme to deprive respondents of their liberty.[7]

B. Fabrication Of Evidence In Order To Deprive A Person Of Liberty Violates The Due Process Clause Whether Or Not It Is Used At Trial

When prosecutors or police fabricate evidence against someone during an investigation with the intent to use that evidence at trial, if necessary, they violate that person's due process rights. And the violation does not depend on whether use of that fabricated evidence at trial ends up being necessary. The vast majority of criminal cases result in guilty pleas, not trials. Surely the Due Process Clause is no less offended when fabricated evidence is used to extract a guilty plea than when it is used to obtain a conviction at trial. Use at trial, therefore, is not an element of the constitutional violation, and petitioners are wrong in their repeated attempts to paint this case as being about only the use of the fabricated evidence at trial. *See, e.g.*, Pet. Br. 9, 12.

Indeed, prosecutors and police violate the Due Process Clause by fabricating evidence to frame a person even where the intended victim neither pleads guilty nor is convicted at trial. In some

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[7] Because of the nature of fabrication of evidence against an identified target, the dichotomy posited by Justice Scalia in *Buckley*—between "the mere preparation of false evidence" and "its use in a fashion that deprives someone of a fair trial or otherwise harms him"—is a false one, at least in a case like this. 509 U.S. at 281 (Scalia, J., concurring). Even if cases involving only "the mere preparation" of fabricated evidence could arise, this is not such a case.

cases, the fabrication may come to light after the intended victim is arrested but in time to save him from wrongful conviction. The discovery may limit the damage, but it does not mean the Constitution was not violated.[8] Likewise, if prosecutors or police fabricate evidence against someone in order to obtain authorization to search his home or tap his phone, the victim's rights are violated even if there ultimately is no arrest or prosecution. And if the effort to frame an innocent citizen drives the victim to suicide before trial, the victim's constitutional rights were surely violated.

Petitioners' argument that no violation occurs until conviction confuses the constitutional violation with its effect. *See* Pet. Br. 10. Intentional fabrication of evidence to frame a citizen violates the Due Process Clause, regardless of whether it results in a conviction. To be sure, if the victim is acquitted, his damages may be lower. But the Due Process Clause forbids the government from engaging in such conscience-shocking misconduct, whether or not a violation of that constitutional rule happens to cause extensive damages, minimal damages, or even no damages in a particular case. *Cf. Carey v. Piphus*, 435 U.S. 247, 266-67 (1978). Try as they might, petitioners cannot render the Constitution indifferent to the

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[8] An important, but frightening, consequence of both petitioners' and the Solicitor General's theory is that a police officer who fabricates evidence to frame a defendant, but fails in his effort to dupe a prosecutor into introducing it, neither violates the Constitution nor could be prosecuted under 18 U.S.C. § 242 (nor could a single officer be prosecuted under 18 U.S.C. § 241).

pre-trial misconduct here unless and until it produces a conviction. Of course, the tragic facts of this case are that the fabrication was not exposed until after respondents had been convicted and suffered 25 years of wrongful imprisonment. But those facts should not obscure the reality that petitioners violated respondents' due process rights long before trial or conviction when petitioners fabricated evidence against respondents with the intent to deprive them of their liberty.

By invoking the harmless-error doctrine, *see* Pet. Br. 10, petitioners unwittingly underscore the fundamental distinction between the substantive constitutional rule and the effect of a violation of that rule in a given case. The harmless-error doctrine does not enshrine the notion that there is no constitutional violation at all in the absence of prejudicial effect, or more colloquially, "no harm, no foul." To the contrary, the question whether an error is harmless arises only if there has been a constitutional violation. *See, e.g., United States v. Andreas*, 216 F.3d 645, 675-76 (7th Cir. 2000). To say that a conviction can be sustained under the harmless-error doctrine notwithstanding the use of fabricated evidence is to presuppose that the use of the fabricated evidence violated the Constitution.

It is not surprising that petitioners shy away from the argument that the Due Process Clause permits a government official to fabricate evidence against a person in order to deprive him of liberty. It is difficult to imagine that a constitutional line is not crossed the moment that investigators shift their focus from solving a crime to framing an

innocent citizen. Yet that is the burden of petitioners' argument.

C. Fabrication Of Evidence To Deprive A Person Of Liberty Violates The Due Process Clause And Is Not Protected By Absolute Immunity, Whether Done By Police Or Prosecutors Performing Police Functions

Petitioners do not dispute that a police officer who fabricates evidence that causes a deprivation of liberty violates the Due Process Clause. *See* Pet. Br. 14-15. The Solicitor General expressly concedes that "police officers who fabricate evidence may be held liable under Section 1983." SG Br. 6. But the question whether due process is offended—as opposed to the question of immunity—does not turn on the job title of the perpetrator. The due process violation inheres in the arbitrary, unjustifiable, and liberty-imperiling nature of the government official's conduct, not his job title. For purposes of the constitutional violation, fabrication of evidence by a prosecutor is no less abhorrent than fabrication by a police officer. And this Court has already considered and rejected the argument that immunity turns on the job title of the perpetrator as opposed to the function performed. *See Kalina v. Fletcher*, 522 U.S. 118, 127 (1997); *Buckley*, 509 U.S. at 273-76. When the prosecutor performs police-type investigative functions, the prosecutor no less than the police officer enjoys only qualified immunity. *See Buckley*, 509 U.S. at 276. Thus petitioners stand or fall with the police officers with whom they worked side-by-side and conspired. All are liable; none is immune.

1. Police officers who fabricate evidence and deliver it to a prosecutor for use at trial violate the Due Process Clause. *See Pyle v. Kansas*, 317 U.S. 213, 216 (1942). As the First Circuit has explained, the proposition that a citizen has the "right not to be framed by the government" is "easy pickings." *Limone v. Condon*, 372 F.3d 39, 44 (1st Cir. 2004). "[I]ndeed," the court emphasized, "we are unsure what due process entails if not protection against deliberate framing under color of official sanction." *Id.* at 45. Other courts have agreed that fabrication of evidence that results in a deprivation of liberty violates due process. *See, e.g., Washington v. Wilmore*, 407 F.3d 274, 282-83 (4th Cir. 2005); *Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001) (en banc); *Wilson v. Lawrence County*, 260 F.3d 946, 954 (8th Cir. 2001); *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997); *Riley v. City of Montgomery*, 104 F.3d 1247, 1253 (11th Cir. 1997).

Nothing in the due process analysis turns on the job title of the state actor who violates a citizen's "right not to be framed by the government," *Limone*, 372 F.3d at 44. The conduct, not the identity of the state actor, drives the constitutional analysis. And the conduct here is repugnant to the Constitution whether committed by a prosecutor or a police officer.

2. a. It is absolutely clear that investigating police officers who fabricate evidence that results in a deprivation of liberty have no claim to absolute immunity. *See, e.g., Castellano v. Fragozo*, 352 F.3d 939, 958 (5th Cir. 2003) (en banc); *Jones v. Cannon*, 174 F.3d 1271, 1289 (11th Cir. 1999).

Because immunity law focuses on the function performed by police officers in investigating, and it is the fabrication during investigation that violates the Constitution, officers are covered only by qualified immunity for investigative conduct. *Jones*, 174 F.3d at 1289. This is so even if the officer intends the fabricated evidence to be elicited by prosecutors at trial through advocacy conduct that is covered by absolute immunity when viewed in isolation. *See Gregory v. City of Louisville*, 444 F.3d 725, 738 (6th Cir. 2006).[9]

Because it is hardly a novel proposition that fabricating evidence to frame someone and deprive him of liberty is unconstitutional, police officers who fabricate evidence are unsuccessful when they claim qualified immunity. As the First Circuit put it in *Limone*: "We conclude, without serious question, that *Mooney* and its pre-1967 progeny provided reasonable law enforcement officers fair warning that framing innocent persons would violate the constitutional rights of the falsely accused." 372 F.3d at 48. This is not an area where reasonable minds could differ or where law enforcement needs some breathing room or margin for error. The conduct is anathematic and

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[9] Similarly, a police officer who fabricates evidence intending that it be elicited at trial through a witness is liable for the fabrication even though the witness is absolutely immune for his testimony under *Briscoe v. LaHue*, 460 U.S. 325 (1983). *See Washington*, 407 F.3d at 283. The law recognizes that the officer's fabrication causes a compensable constitutional injury, notwithstanding subsequent conduct by others in the chain of causation protected by absolute immunity. *See* pp. 44-45, *infra*; *cf. Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986).

obviously so. The same principles apply to prosecutors who fabricate evidence to frame innocent citizens while purporting to investigate the crime. If anything, the warning signs ought to be all the more unmistakable to the prosecutor.

b. This Court's cases make it abundantly clear that prosecutors, like police officers, are eligible only for qualified immunity when they engage in unconstitutional conduct during the investigative phase of the criminal process. Even before *Buckley*, this Court had repeatedly emphasized its functional approach to absolute immunity, which focuses on "the nature of the function performed, not the identity of the actor who performed it." *Forrester v. White*, 484 U.S. 219, 229 (1988); *accord Burns v. Reed*, 500 U.S. 478, 486 (1991); *Briscoe*, 460 U.S. at 342. If there were any lingering notion that a prosecutor might enjoy absolute immunity for conduct within the broadest conception of his job duties simply by virtue of being a prosecutor, this Court's decision in *Buckley* dispelled it. The Court in *Buckley* considered at length the prosecutors' performance of "the investigative functions normally performed by a detective or police officer," 509 U.S. at 273, and it held that the function being performed was dispositive: "When the functions of prosecutors and detectives are the same . . . the immunity that protects them is also the same." *Id.* at 276.

Unlike some of their amici, *see* Nat'l Ass'n of Counties Br. 28-33, petitioners do not ask the Court

to overrule *Buckley*.[10] But *Buckley* stands as an insuperable obstacle to their absolute immunity argument. *Buckley* leaves open Justice Scalia's argument that the Constitution is not violated unless and until the fabricated evidence is used at trial (an argument that is wrong, *see* pp. 22-27, *supra*, and appears to rest on a view of due process not shared by the Court as a whole). *See* 509 U.S. at 281-82 (Scalia, J., concurring). But it does not leave open the argument that the investigative conduct is absolutely immune. Indeed, that was the whole point of Justice Scalia's concurrence. *See id.* at 279-80.

Accordingly, overruling *Buckley* is the only way to confer absolute immunity on petitioners for their investigative conduct. Rather than candidly shouldering the burden of asking for *Buckley* to be overruled, petitioners take liberties with the Court's opinion. Petitioners observe that the Court recognized that a prosecutor's absolutely immune advocacy conduct may include "actions preliminary to the initiation of a prosecution and actions apart from the courtroom," Pet. Br. 24 (quoting *Buckley*, 509 U.S. at 272), and petitioners argue that this principle entitles them to absolute immunity for what they euphemistically term their "pre-trial acts," Pet. Br. 20 (capitalization omitted). But petitioners ignore that in the next paragraph of its opinion, the Court emphatically rejected the notion

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[10] Petitioners' choice is prudent. Even Justices who have questioned the Court's functional approach have recognized that it is so "deeply embedded" that it merits adherence as a matter of stare decisis. *See Kalina*, 522 U.S. at 135 (Scalia, J., concurring).

that absolute immunity extends as far as a prosecutor's performance of ordinary police-type investigative work:

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand.

509 U.S. at 273. Petitioners also ignore the Court's explicit holding that absolutely immune advocacy conduct does not begin until a prosecutor has probable cause for arrest. *See id.* at 274. Based on the admitted facts, petitioners engaged in extensive ordinary police-type investigation and fabricated evidence against respondents long before probable cause attached.

Indeed, the misconduct here is much more clearly investigative and pre-probable-cause than the conduct in *Buckley*. While some cases involve more difficult line-drawing, *see Buckley*, 509 U.S. at 289 (Kennedy, J., concurring in part and dissenting in part), petitioners here performed classic police work—*e.g.*, interviewing witnesses, canvassing the neighborhood for leads—and did so in the immediate wake of the crime and long before petitioners could plausibly be said to be preparing for judicial proceedings. *See* J.A. 56-62. Richter, no doubt aware of the importance of solving the crime to his election effort, was involved in the investigation from the outset. And Hrvol worked alongside police officers long before he was

assigned the case for prosecution purposes. *See* pp. 1-9, *supra*. This is presumably why petitioners conceded in their petition for certiorari that they "were functioning as investigators at the time they allegedly procured false testimony against respondents; accordingly, only qualified immunity applied." Pet. 19. In sum, their claim to absolute immunity cannot be reconciled with *Buckley*.

3. For the foregoing reasons, it is clear that a prosecutor is subject to liability under § 1983 if he fabricates evidence to frame an innocent citizen and hands that evidence over to a colleague who uses it at trial. The fabricating prosecutor is not entitled to absolute immunity, because he engages in no advocacy conduct directly related to the fabricated evidence. And his fabrication, no less than a police officer's, violates the Due Process Clause because it causes an intended or at least foreseeable deprivation of liberty. The fabricating prosecutor is liable regardless of whether he deceives the trial prosecutor into using the phony evidence, coerces the trial prosecutor into using it, or conspires with the trial prosecutor to use it, because in all those scenarios, his fabrication is a cause of the deprivation of liberty. *See Malley*, 475 U.S. at 344 n.7 (magistrate's issuance of warrant does not protect officer from liability for applying for unreasonable warrant, because § 1983 makes officer "responsible for the natural consequences of his actions") (internal quotation marks omitted). The Solicitor General concedes as much. *See* SG Br. 25 n.6.[11] Specifically, the Solicitor General

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[11] The Solicitor General's extended detour into the common law's treatment of malicious prosecution, *see* SG Br.

agrees that "on facts like those alleged here, a person who bears the title prosecutor, but who 'perform[ed] [only] the investigative functions normally performed by a detective or police officer,' *Buckley*, 509 U.S. at 273, would be liable." SG Br. 7

22-31, is puzzling. Although the Court may look to the common law "when [thinking] about elements of actions for constitutional violations . . . the common law is best understood here more as a source of inspired examples than of prefabricated components of [constitutional] torts." *Hartman v. Moore*, 547 U.S. 250, 258 (2006) (citation omitted). In any event, nothing in the long excursion provides any support for the notion that prosecutors could not be subject to liability for "procurement." Indeed, the Solicitor General is forced to admit that the common law permitted claims of "conspiracy between officer and prosecutor" to fabricate evidence. SG Br. 25 n.6. Moreover, the point of this exercise seems to be to establish that procurement liability is a species of "vicarious" liability. SG Br. 24, 29. But that is wrong. Procurement liability is not vicarious liability, but rather a species of inchoate liability. *See Pinkerton v. United States*, 328 U.S. 640, 647 (1946). The difference fatally undermines the government's argument that the Constitution is not violated by the fabrication but rather only by the "primary" violation at trial, since inchoate liability does not depend on the later violation. Moreover, the fact that procurement liability is a form of inchoate—and not vicarious—liability explains why a police officer who dupes an innocent prosecutor into presenting fabricated evidence is liable, even though the prosecutor's trial conduct is innocent. The police officer cannot be "vicariously" liable for the prosecutor's conduct, because the prosecutor's conduct is not wrongful. *See, e.g., Doe v. Cunningham*, 30 F.3d 879, 884 (7th Cir. 1994) ("Cunningham and Birgans were not negligent. The Province therefore has nothing to be vicariously liable for based on [their] actions."). Instead, the police officer is liable because he violated the Constitution by fabricating evidence to frame the defendant, even if that violation was inchoate.

(alterations in original). That concession describes petitioner Richter, who fabricated evidence against respondents during the investigative phase but who did not have any direct role in presenting that evidence at respondents' trials. Richter therefore is indistinguishable from a police officer for purposes of liability.[12]

In the end, Hrvol fares no better than Richter. Neither the existence of a due process violation nor the absolute immunity question turns on the identity of the person who ultimately introduced the fabricated evidence at trial. There is no special rule that a prosecutor who fabricates evidence to frame an innocent citizen can grant himself absolute immunity if, but only if, he takes the further unconstitutional step of introducing the fabricated evidence at trial.

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[12] Indeed, petitioners' own statement of the question presented effectively excludes Richter. It asks whether a prosecutor may be sued where he "procur[ed] false testimony during the criminal investigation, *and then . . . introduced that same testimony against the defendant at trial.*" Pet. Br. i (emphasis added). Richter did not present any of the fabricated evidence; Hrvol did so at both trials. Richter did not participate in Harrington's trial. At McGhee's trial, Richter examined two secondary witnesses for the State (the medical examiner and Schweer's widow) and cross-examined McGhee's girlfriend. This difference between Richter and Hrvol was not a focus of the proceedings below, but that is a function of the arguments that petitioners made and preserved below. They did not offer a causation argument that turned on the precise role of the prosecutors at the trials. Instead, they offered a broad claim of absolute immunity that the Eighth Circuit correctly rejected as incompatible with *Buckley*.

As a matter of both constitutional law and logic, a later constitutional violation—even one shielded by absolute immunity—compounds the earlier violation. It does not erase it. *See Gregory*, 444 F.3d at 739 ("Merely because a state actor compounds a constitutional wrong with another wrong which benefits from immunity is no reason to insulate the first constitutional wrong from actions for redress."). As a matter of absolute immunity doctrine, if particular conduct is not shielded by absolute immunity when it occurs, subsequent conduct involving a distinct function protected by absolute immunity does not transform the earlier conduct. The latter, distinct actions do not wash back and immunize the earlier conduct involving a different function. *Buckley* so held: the prosecutors' non-advocacy work remained non-advocacy work and protected only by qualified immunity even after the prosecutors later convened a grand jury and performed an advocacy function. "A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as 'preparation' for a possible trial." 509 U.S. at 276.

Apart from its illogic and incompatibility with this Court's precedents, the prospect that an official could immunize himself by committing a second constitutional violation would create dangerous incentives. Where a prosecutor who fabricates evidence "hands it to an unsuspecting prosecutor," it is possible that the innocent prosecutor will discover the fabrication and abort the unlawful

plan. *See Zahrey v. Coffey*, 221 F.3d 342, 353 (2d Cir. 2000). In contrast, where the fabricator "enlists himself," as Hrvol did here, that chance of exposure does not exist and the victim is at even greater risk. *See id.* Judge Newman was thus correct that "[i]t would be a perverse doctrine of tort and constitutional law" that would hold the prosecutor liable in the former case but not the latter. *Id.*; *see also* Pet. App. 18a. The law should not *encourage* a prosecutor who fabricates evidence to follow through and use that evidence himself at trial.

The courts that have confronted the question directly have unsurprisingly rejected such a conception of immunity as antithetical to the rule of law. In *Thomas v. Sams*, 734 F.2d 185, *reh'g denied*, 741 F.2d 783 (5th Cir. 1984), for example, Sams was the mayor of a city as well as its magistrate. He signed a criminal complaint as mayor and then, as magistrate, issued an arrest warrant "based on the complaint that he had himself just signed." 734 F.2d at 188. Sams argued that he could not be sued for signing the complaint without probable cause because he had absolute judicial immunity for issuing the arrest warrant. The Fifth Circuit held that Sams could not "i[n]oculate" his non-immune conduct by "ak[ing] up his magistrate's pen." *Id.* at 191. Similarly, in *Gregory*, the Sixth Circuit held that the defendants' trial testimony, though itself covered by absolute immunity, could not "relate backwards" to immunize their fabrication of evidence during the investigative stage. 444 F.3d at 738; *see also id.* at 739 ("This Court has never

endorsed such a self-serving result."); *Spurlock v. Satterfield*, 167 F.3d 995, 1004 (6th Cir. 1999) (rejecting "the untenable result that officials who fabricate evidence . . . could later shield themselves from liability simply by presenting false testimony regarding that evidence").

II. USE OF FABRICATED EVIDENCE AT TRIAL DOES NOT IMMUNIZE EARLIER MISCONDUCT OR BREAK THE CHAIN OF LIABILITY

A. Absolute Immunity Does Not Make A Prosecutor's Conduct Constitutional Or Privileged

Absolute immunity determines whether a civil damages remedy is available against a prosecutor for a particular act. Because absolute immunity does not determine (or, unlike qualified immunity, even directly relate to) whether conduct is constitutional, a prosecutor's act may be unconstitutional and may form part of an unconstitutional conspiracy even if the act itself is covered by absolute immunity. *See Briscoe*, 460 U.S. at 341 n.26. That the overall conspiracy involved an absolutely immune act, therefore, does not alter the reality that both the conduct that preceded the absolutely immune act and the absolutely immune act itself violated the Constitution. *See Dennis v. Sparks*, 449 U.S. 24, 28 (1980) (although judge was immune, "[i]mmunity does not change the character of the judge's action or that of his co-conspirators").

Nor does absolute immunity confer use immunity; it does not prevent evidence of the

absolutely immune and unconstitutional act from being introduced at trial. Absolute prosecutorial immunity is a limitation on damages and certain civil actions, not an evidentiary privilege. Absolute immunity is quite different from Speech or Debate Clause immunity in this regard. *See id.* at 30. Although absolute immunity protects against both damages and standing trial, it protects against standing trial as a defendant, not against testifying, and it certainly does not render the facts surrounding the unconstitutional, but immune, conduct inadmissible. Petitioners thus vastly exaggerate the role of absolute immunity in asserting that "the fact and consequences of any use that petitioners made of allegedly false testimony at respondents' criminal trials could not properly be an issue—indeed, it could not properly be discussed or entered into evidence—in the [present case]." Pet. 15. Not surprisingly, no citation follows this assertion, and it is foreclosed by, *inter alia*, this Court's decision in *Dennis*.

In *Dennis*, a state judge and private parties allegedly conspired to stop production from an oil lease by having the judge enter an injunction in exchange for a bribe. 449 U.S. at 25-26. The private-party co-conspirators argued that the judge's absolute immunity for issuing the injunction meant that the case could not be brought against them either, because allowing litigation of claims of judicial corruption would "seriously erode[]" the judge's immunity. *Id.* at 29. This Court disagreed, holding that the judge's immunity from civil damages suit did not give him a privilege against testifying about his immune conduct or bar

litigation against other parties for the conspiracy. *See id.* at 30-31. Judicial immunity is "comparatively sweeping," *Forrester*, 484 U.S. at 225, shielding all judicial actions except those taken in the complete absence of jurisdiction, *see Mireles v. Waco*, 502 U.S. 9, 12 (1991) (per curiam). "But judicial immunity was not designed to insulate the judiciary from all aspects of public accountability." *Dennis*, 449 U.S. at 31. *A fortiori*, the far narrower doctrine of prosecutorial immunity under the function test does not preclude respondents' claims just because petitioners' conspiracy included some acts that, viewed in isolation, are absolutely immune.

B. The Vast Majority Of Petitioners' Unconstitutional Course Of Conduct Is Not Covered By Absolute Immunity

Respondents pleaded in great detail a conspiracy to fabricate evidence to deprive them of their liberty. *See* pp. 4-10, *supra*. Respondents' facts are drawn from police reports, deposition transcripts (including depositions of petitioners and co-defendants), and other objective evidence that demonstrates the existence of the conspiracy and petitioners' participation in it. *See* J.A. 55-74. The conspiracy that respondents proved without dispute on summary judgment includes extensive conduct that is not covered by absolute immunity and would shock the most jaded of consciences. In particular, petitioners conspired with detectives to use Hughes as a mouthpiece to fabricate evidence against respondents. *See* J.A. 59-70, 73-74. The conspirators knew that Hughes had lied repeatedly in his attempts to tell a story they liked; indeed,

they knew that Hughes was incapable of telling a truthful story about the murder because he lacked any personal knowledge about it. *See* J.A. 63. The conspirators fed Hughes the information that they wanted him to repeat, and, with coaching, Hughes eventually learned to repeat it. *See* J.A. 64. Under *Buckley*, as petitioners admitted in their petition, they "were functioning as investigators at the time they allegedly procured false testimony against respondents; accordingly, only qualified immunity applied." Pet. 19; *see also* Pet. App. 73a, 78a.

Petitioners' repeated attempts to portray this case as exclusively about respondents' trials, *see, e.g.*, Pet. Br. 5-6, simply disregard all this evidence. When respondents engaged in the investigative activity described above, they did not have absolute immunity; they had not yet engaged in any advocacy functions "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. Petitioners thus get it backwards in accusing the courts below of allowing their "conduct *before* trial [to] prospectively vitiate[] their absolute immunity *at* trial." Pet. Br. 6; *see also id.* at 22. In reality, petitioners are asking this Court to allow their conduct at trial to retrospectively immunize their investigative conduct that was not absolutely immune when it occurred. That is precisely what *Buckley* rejected, *see* 509 U.S. at 276, which explains petitioners' (correct) concession in their petition.[13]

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[13] Petitioners now argue that their fabrication of evidence during the investigative stage was absolutely immune because it was "directly connected" with respondents' trials.

In short, this case involves extensive conduct by petitioners that is not covered by absolute immunity under *Buckley*'s clear rule. The existence of such substantial non-absolutely-immune conduct belies petitioners' and their amici's protestations that the decision below renders prosecutorial immunity "meaningless" because all a plaintiff has to do is to "plead[] that [the prosecutor] was somehow involved in a pre-trial investigation." SG Br. 7; *see also, e.g.*, Pet. Br. 33. Respondents have done far more than merely plead that petitioners were "somehow involved in a pre-trial investigation." It took 25 years for the facts to come out and petitioners' conspiracy to unravel, but unravel it did. Respondents pleaded dozens of pages of detailed facts to support their claims that petitioners performed police-type investigative functions and were at the heart of the decision to stop searching for the true killer and to start framing innocent citizens. *See* Harrington Compl.

Pet. Br. 23 (quoting *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 862 (2009)). This argument is wholly without merit. First, this argument squarely contradicts (without so much as acknowledging) petitioners' concession in the petition that they were functioning as investigators when the alleged fabrication occurred, and it should be dismissed for that reason alone. Second, this argument squarely conflicts with *Buckley*'s holdings that (1) a prosecutor's investigative activities prior to probable cause are not covered by absolute immunity, *see* 509 U.S. 274-75 & n.5, and (2) retroactively describing investigative work as preparation for trial cannot change that result, *see id.* at 276; *see also Burns*, 500 U.S. at 495. Petitioners do not suggest that *Van de Kamp* overruled *Buckley* on these points, nor could they given that *Van de Kamp* cited *Buckley* with approval and did not even involve investigative work by a prosecutor. *See* 129 S. Ct. at 861.

5-47; McGhee Compl. 3-34. This is emphatically not a case where a plaintiff tries to use a thin pleading of a sliver of non-immune activity to circumvent *Imbler*, and the Court does not need to decide whether such a case could proceed. *See* pp. 50-53, *infra*.[14]

C. Subsequent Absolutely Immune Acts Do Not Break The Chain Of Liability Arising From Earlier, Non-Immune Acts

1. This Court need not address the question of causation separately. It is enough to reject petitioners' twin contentions that the Constitution is indifferent to their pre-trial misconduct and that they enjoy absolute immunity despite *Buckley*. Indeed, typically this Court has not addressed causation separately in its absolute immunity cases. *See* pp. 45-48, *infra*. Nonetheless, the presence in a course of unconstitutional conduct of

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[14] Because this case is in this Court on petitioners' interlocutory appeal from the denial of absolute immunity, issues of damages have not yet been litigated and this Court need not decide the proper measure of damages for petitioners' fabrication of evidence during the investigative phase. *Cf. Peña v. Mattox*, 84 F.3d 894, 897 (7th Cir. 1996) (Posner, J.) ("A prosecutor has no immunity for the acts that he does outside his role as a prosecutor; and the law of conspiracy would impute to him, as a coconspirator, the acts of the other, nonprosecutor members of the conspiracy.") (citation omitted). Unless the Court decides that neither police officers nor prosecutors have any liability for this kind of misconduct, courts will eventually have to confront the damages issues. Once they do, and if a concrete difference in approach emerges, the issue will be ripe for this Court's consideration.

an absolutely immune act does not, as a matter of law, break the chain of liability or preclude damages proximately caused by earlier, non-immune acts whose intent and natural consequence were to cause those damages. This Court so held in *Malley*, where it addressed whether a magistrate's decision to issue a warrant "breaks the causal chain between the [officer's] application for the warrant and the improvident arrest." 475 U.S. at 344 n.7. The magistrate's issuance of the warrant was an absolutely immune judicial act, and that act was a but-for cause of the arrest, but this Court rejected a "no causation" argument as "inconsistent with our interpretation of § 1983" making a person "responsible for the natural consequences of his actions." *Id.* (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961)).

Similarly, if an officer fabricates evidence and later presents that evidence as a witness at trial, the officer can be liable for the fabrication even though his testimony is itself immune under *Briscoe*. *See, e.g.*, *Spurlock*, 167 F.3d at 1004. And an officer who fabricates evidence and delivers it to a prosecutor for use at trial can be liable even though the prosecutor's use of the evidence at trial is itself absolutely immune advocacy under *Buckley*. *See Washington*, 407 F.3d at 283-84. Moreover, *Dennis* suggests, though it does not hold, that other state actors are liable for a bribery conspiracy even though the bribed judge's act of entering an injunction is absolutely immune. In all these scenarios, conduct that is absolutely immune intervenes between the earlier, non-immune conduct and the injury, but the absolutely immune

conduct does not necessarily sever the chain of liability arising from the earlier conduct. So too here, petitioners' fabrication of evidence gives rise to liability in part because its natural and intended consequence was to deprive respondents of liberty, and liability is not defeated by the subsequent intervention of absolutely immune conduct. "The intervention of a subsequent immunized act by the same officer does not break the chain of causation necessary for liability." *Michaels v. McGrath*, 531 U.S. 1118, 1118 (2001) (Thomas, J., dissenting from denial of certiorari); *see also Carver v. Foerster*, 102 F.3d 96, 101 (3d Cir. 1996) ("An unconstitutional or illegal course of conduct by county government does not fall within the doctrine of absolute immunity merely because it is connected to or followed by a vote of a county board.").

2. This Court's prosecutorial immunity cases, unlike *Malley*, have not expressly addressed this causation question directly. But there is no logical or doctrinal reason why a different analysis should apply merely because the subsequent act is absolutely immune as a prosecutorial act rather than a judicial act. Indeed, this Court's prosecutorial immunity cases appear to rest on the implicit premise that the *Malley* analysis applies in this context as well. Otherwise, the decisions make little sense. In *Burns* and *Kalina*, the Court took great care to isolate the particular acts to which absolute immunity applied while expressly holding that other closely-related acts did not trigger absolute immunity. If the presence of a subsequent absolutely immune act precluded liability as a matter of law, the Court's meticulous parsing of the

prosecutors' conduct was little more than a fool's errand.

In *Burns*, for example, the Court considered a prosecutor's legal advice about the permissibility of using hypnosis to elicit a statement from a witness and the prosecutor's later appearance in a probable-cause hearing to obtain a warrant based on testimony elicited while the witness was hypnotized. Despite the obvious relationship between the two activities, the Court analyzed them separately and focused, not on their relationship to each other, but on the relationship of each to the judicial process. *See* 500 U.S. at 487-96. And the Court ultimately held that absolute immunity shielded the prosecutor's appearance at the probable-cause hearing but not his legal advice to the police. *See id.* at 492, 495-96. Obviously, the cause of the real damage in *Burns* flowed from the use of the evidence to obtain the warrant. Nonetheless, the Court viewed the acts separately and remanded the case to allow it to proceed based on the non-absolutely-immune conduct.

The prosecutor's acts at issue in *Kalina* were, if anything, even more closely related, but the Court once again analyzed them separately and reached varying immunity conclusions. The Court held that a prosecutor was entitled to absolute immunity for filing two charging documents that were based on an inaccurate supporting certification. 522 U.S. at 129. The Court then held that the prosecutor was not absolutely immune for executing the inaccurate certification itself. *Id.* at 129-31. The prosecutor argued that "the execution of the certificate was just one incident in a presentation that, *viewed as a*

whole, was the work of an advocate and was integral to the initiation of the prosecution." *Id.* at 130 (emphasis added). The Court, however, refused to view the three documents, which had been filed together, as an integrated whole. *See id.* It is hard to imagine that the plaintiff suffered any injury from the certification separate and apart from its use to support the charging documents. The certification served no independent purpose. Yet the Court analyzed each of the documents separately and allowed the claims based on the non-absolutely-immune conduct to go forward.

If there were a legal rule that the presence of an absolutely immune act in the chain of causation precluded liability for non-immune acts, the distinctions drawn in these cases would have been pointless. In *Burns*, the Court could have avoided analyzing the prosecutor's legal advice because it caused no independent injury and his subsequent absolutely immune activity in appearing at the probable-cause hearing seemingly would have broken the chain of liability. Likewise, in *Kalina*, there would have been no reason to parse the prosecutor's filing into three separate documents, because the certification could not have caused any injury independent of the absolutely-immune charging documents. The consistent, clear mode of analysis that this Court has employed in prosecutorial immunity cases makes sense only if *Malley* applies.

A rule that a subsequent absolutely immune act breaks the chain of liability arising from earlier, non-immune acts also would render holdings outside of the prosecutorial immunity context

nothing more than hollow shells. *Dennis*, for example, would fall victim. In *Dennis*, even though the conspiracy culminated in the judge's issuance of an injunction—an absolutely immune act—the Court carefully analyzed the potential liability of the judge's co-conspirators and whether the judge could testify about his immune act. 449 U.S. at 28-31. None of that would have mattered if the judicial act precluded liability for the private co-conspirators who sought it.

3. Such a rule also would improperly expand absolute prosecutorial immunity, as a practical matter, far beyond the bounds this Court has set for it. It would essentially render the functional approach to absolute immunity a dead letter and belie the Court's admonition that later absolutely immune acts do not wash back and launder earlier unprotected misconduct. A prosecutor's typical course of conduct will include an absolutely immune act—*e.g.*, filing charging documents, *Kalina*, 522 U.S. at 129; appearing before a grand jury; appearing at a probable-cause hearing, *Burns*, 500 U.S. at 492; or appearing at trial. If the absolute immunity that applies to those advocacy activities barred suit as a matter of law for the prosecutor's earlier activities, that would effectively immunize investigative conduct that this Court has held is not covered by absolute immunity. *See Zahrey*, 221 F.3d at 353 n.10 ("Deeming the chain of proximate causation broken by the prosecutor's use of evidence he himself fabricated would also, in practical effect, enlarge the scope of the prosecutor's absolute immunity."). Absolute immunity would be neither "quite sparing" nor

meaningfully governed by the functional test. *See Buckley*, 509 U.S. at 269.

III. APPROPRIATELY LIMITED LIABILITY WILL NOT HARM THE JUDICIAL PROCESS AND IS NECESSARY TO AVOID LEAVING PROSECUTORS FREE TO FABRICATE EVIDENCE WITH PRACTICAL IMPUNITY

Petitioners' fabrication of evidence to deprive respondents of their liberty is egregious, exceptional, and remarkably well-documented. The strict limits that this Court already has placed on suits against prosecutors—from absolute immunity for advocacy conduct, to the strict pleading requirements of *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), to the substantive and procedural protections of qualified immunity—will ensure that prosecutors and courts are not burdened by a flood of insubstantial cases. Petitioners' amici are wrong to contend that allowing this case to proceed will "distort[] . . . the prosecutorial function and the administration of justice." Br. of Colorado, et al. at 15. The misconduct at issue here has nothing to do with the proper administration of justice. It is the antithesis of that. To bar any possibility of redress for fabrication of evidence to frame innocent African-Americans would distort Congress's intent in enacting § 1983 and imperil the administration of justice by establishing a regime of practical impunity. For with respect to the supposed alternative means of ensuring that prosecutors do not commit such misconduct and are punished when they do, *see generally* Br. of Nat'l Ass'n of AUSAs, this case is unfortunately not exceptional

at all: petitioners have suffered no consequences for their misconduct and face no prospect of any consequences, save for this lawsuit.

A. There Is No Reason To Fear A Flood Of Claims Against Prosecutors

In light of the extraordinary and conscience-shocking conduct at issue here, petitioners' floodgates concerns were vastly overstated even before *Iqbal*. After *Iqbal*, the concerns are wholly misplaced.

Petitioners' misconduct was truly extreme. Petitioners did not merely rely on Hughes despite doubts about his truthfulness. Having established Hughes's willingness to lie, petitioners and their co-conspirators repeatedly took him to the crime scene and fed him a false story until he could repeat it. J.A. 63-64, 74. Petitioners did not merely choose to believe a factually debatable version of events or decide to proceed despite "a sharp conflict in the evidence." *Imbler*, 424 U.S. at 426 n.24. They used Hughes to manufacture new events that never occurred. J.A. 64, 74. Nor did they stop there. They disregarded evidence that pointed to the actual, not fabricated, suspect, and worked overtime to fabricate corroborating testimony for Hughes's concocted eye-witness account. This case is about actual fabrication of false evidence, the framing of innocent citizens while disregarding real evidence of real suspects, not "fabrication" used loosely, for example, to refer to shopping for a favorable expert, *see Buckley v. Fitzsimmons*, 919 F.2d 1230, 1236 (7th Cir. 1990). Because the admitted facts in this case are so extreme,

acknowledging that petitioners may be held liable will not unleash a flood of claims against prosecutors.

One deterrent against too-easy resort to claims against prosecutors is the strict approach to pleading that this Court adopted in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and recently reaffirmed in *Iqbal*. Even before those cases, the extreme, repeated misconduct here is not the kind of easy-to-allege but hard-to-disprove misconduct that generated concerns about undermining immunity. But *Iqbal* and *Twombly* remove such concerns altogether. Now that it is clear that "naked assertion[s]' devoid of 'further factual enhancement'" need not be taken as true, *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557), many claims of constitutional violations by prosecutors will be dismissed for failure to provide adequate factual detail. And now that it is clear that even well-pleaded factual allegations do not suffice unless they allege a "plausible" violation, many claims will be dismissed on the ground that it is "unrealistic" or implausible to believe that the prosecutors truly committed the misconduct alleged. *See id.* at 1950-51. Petitioners' suggestion that "a mere allegation" of non-absolutely-immune conduct will ensnare prosecutors in "vexatious litigation," Pet. Br. 33, simply ignores *Iqbal* and the content of the complaints here. Most would-be plaintiffs will be unable to allege dozens of pages of detailed facts, as respondents did.

Qualified immunity, which has always been deemed sufficient for police officers, will ensure

that prosecutors are neither cowed into inappropriate timidity nor distracted by burdensome litigation. First, by barring suit unless the prosecutor violated a constitutional rule that was clearly established in the circumstances, qualified immunity ensures that only clear-cut cases go forward. Outright fabrication of evidence has long been clearly unconstitutional, but lesser variants of misconduct may not rise, or perhaps more accurately sink, to the conscience-shocking level or at least may not clearly have done so at the time of the conduct or under the particular circumstances at issue. *See, e.g.*, *Devereaux*, 263 F.3d at 1077, 1082 (stating that "[t]he investigatory behavior of which Devereaux complains is indeed troubling, and we do not condone it," but rejecting due process claim because using questionable interview techniques in child sex-abuse investigation is one thing and "intentionally fabricating false evidence is quite another").

Iqbal reinforces this protection by requiring courts to focus on the substance of the alleged facts rather than a complaint's labels or conclusions. While a broad label could capture misconduct on both sides of the clearly established line, the specific misconduct alleged here blatantly crosses constitutional lines that have long been clear. Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law," *Malley*, 475 U.S. at 341, and little can be said in favor of protecting the latter. *See Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) ("We do not believe that the security of the Republic will be threatened if its Attorney General

is given incentives to abide by clearly established law.").

Second, qualified immunity's procedural protections minimize the burden of civil-rights litigation. If a prosecutor's motion to dismiss is denied, he can take an immediate appeal, and he is not subject to discovery in the meantime. *See Iqbal*, 129 S. Ct. at 1953-54. In fact, the difference between the merits-linked approach of qualified immunity and the functional test for absolute immunity means that qualified immunity provides even greater protection from entanglement in litigation until the immunity issue is resolved. As noted, a prosecutor relying on qualified immunity to move to dismiss can avoid discovery unless the court of appeals rules that the complaint states a clearly-established violation. Because the functional test for absolute immunity, in contrast, is not tied to the merits of the claim, the court of appeals lacks jurisdiction on interlocutory appeal to consider whether a valid constitutional claim has been stated. *See Paine v. City of Lompoc*, 265 F.3d 975, 983 (9th Cir. 2001).

This is hardly the first time that this Court has been told that absolute immunity is necessary for a government official to do his job. *See, e.g.*, Pet. *Malley v. Briggs* Br. 24-25. The Court has been rightly skeptical of such claims. Indeed, the Solicitor General has consistently sought broad absolute immunity for prosecutors, and the Court has consistently refused to abandon the more discriminating functional test. *See* SG *Imbler* Br. 12-22 (arguing unsuccessfully for absolute immunity for everything a prosecutor does); SG

Burns Br. 13-23 (arguing unsuccessfully for absolute immunity for all conduct at issue); SG *Buckley* Br. 13-19 (arguing unsuccessfully for absolute immunity for investigatory conduct); SG *Kalina* Br. 11-23 (arguing unsuccessfully for absolute immunity for all conduct at issue). The Court likewise was not persuaded when the Government argued that absolute immunity was necessary for the Attorney General in his performance of national security functions. Without gainsaying the importance of those functions, the Court rejected the contention that "restraints" in the form of litigation as a check on potential abuses of authority were "completely unnecessary." *Mitchell*, 472 U.S. at 523.[15]

In lamenting that *Iqbal* is not "an adequate substitute for categorical exemption from liability," SG Br. 13 n.3, the Solicitor General forgets that prosecutors have never had a "categorical exemption from liability" under this Court's functional test, and to the extent such a categorical exemption has been sought, the Court has often rejected it. Moreover, what *Mitchell* and *Iqbal* read together show is that even in the context of the Attorney General's national security responsibilities, qualified immunity with rigorous

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[15] The Court does not need to decide whether it would be appropriate to create a *Bivens* claim against federal prosecutors similar to respondents' §§ 1983 and 1985(3) claims. The Court has a freer hand in fashioning the judicially-created *Bivens* remedy than in interpreting Congress's work as codified in § 1983. *See, e.g., Correctional Serv. Corp. v. Malesko*, 534 U.S. 61, 71 n.5 (2001) (noting that state prisoners have § 1983 claim against private prisons, but declining to create similar *Bivens* claim).

pleading requirements strikes the right balance. It is hard to imagine why a local prosecutor involved in investigative functions typically performed by a police officer needs any greater protection. *See Burns*, 500 U.S. at 486 ("The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties.").

Calamitous consequences have not resulted from the Court's prior denials of absolute immunity and will not result from denying prosecutors absolute immunity for fabricating evidence during the investigative phase. To be sure, most prosecutors adhere to the highest standards of professional conduct and would not engage in any conduct that looks remotely like the misconduct at issue here. All prosecutors deserve qualified immunity for their investigative functions, which are by no means mandatory,[16] and qualified immunity by its nature provides added protection for conduct that is close to the line or that crosses a line that has not been clearly established. But that is not this case. The conduct here was not of doubtful legality or close to the line. The question here is whether there is going to be any line at all.

B. Alternative Remedies Are Inadequate To Deter Prosecutorial Misconduct

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[16] If the absence of absolute immunity for prosecutors undertaking police work proves too disruptive, prosecutors always have the option of leaving police work to the police who have operated for decades protected only by qualified immunity.

Petitioners' amici describe a host of other remedies to punish prosecutors for misconduct. *See, e.g.*, Nat'l Ass'n of AUSAs Br. 7-16; *see also Imbler*, 424 U.S. at 428-29. The most notable thing about amici's lengthy catalog of supposed remedies, however, is that petitioners have not faced any of them. The highest court in the State of Iowa found that petitioners had violated the Constitution by suppressing exculpatory evidence. *Harrington v. State*, 659 N.W.2d 509, 521-25 (Iowa 2003). What consequences befell the prosecutors for that unconstitutional action? Petitioners did not face so much as a state-bar investigation, and they remain members in good standing of the Iowa bar in private practice in Council Bluffs. "Remedies" that go unused when serious, documented prosecutorial misconduct comes to light are little better, and perhaps worse, than no remedies at all. Unfortunately, the lack of meaningful response is typical. *See* Wayne D. Garris, Jr., *Model Rule of Professional Conduct 3.8: The ABA Takes a Stand Against Wrongful Convictions*, 22 GEO. J. LEGAL ETHICS 829, 842-43 (2009).[17] The reality is that bad prosecutors are deterred by, and punished by, civil-rights suits like this one, or not at all.[18]

Prosecutors, like police officers, need the breathing room provided by qualified immunity,

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[17] *See also* Maurice Possley & Ken Armstrong, *Prosecution on Trial in DuPage*, CHI. TRIB., Jan. 12, 1999, *available at* http://www.chicagotribune.com/news/watchdog/chi-020103trial3,0,610421.story.

[18] The district court found that County Attorney Wilber procured McGhee's 2003 *Alford* plea by fraud. *See* p. 13, *supra*. Nothing has happened to Wilber either.

but they should not be encouraged to believe that they can engage in egregious misconduct like fabricating evidence to frame innocent citizens without suffering any personal repercussions. Prosecutorial misconduct is not merely an issue of academic interest; it affects the interests of real victims and of the public at large. *See, e.g.*, Carrie Johnson, *U.S. Seeks Release of Convicted Alaska Lawmakers*, WASH. POST., June 5, 2009. Prosecutors who consider engaging in misconduct would benefit from even the muted incentives not to violate constitutional rights by fabricating evidence that qualified immunity would provide. *See Malley*, 475 U.S. at 343; *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) ("[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate").

C. Petitioners' Effort To Immunize A Conspiracy To Frame Innocent Citizens Strikes At The Heart Of § 1983

This is a case in which it is particularly important not to lose the forest for the trees. As petitioners' brief demonstrates, it is possible to construct an argument that isolates particular acts of misconduct and suggests those acts standing alone are either not sufficient to state a constitutional violation or absolutely immune. It is impossible, however, to look at the real conduct at issue here and conclude either that the Constitution is not violated or that the pre-probable-cause misconduct should be cloaked in absolute immunity. This Court has engaged in

painstaking efforts to ensure that prosecutors turn square corners over matters such as whether a laboratory report was introduced through live testimony. *See Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). Such constitutional guarantees are vital, but it makes little sense to preserve finely-reticulated guarantees and then turn around and grant immunity to a blatant effort to convert these protections into a sham by perverting a system designed for the administration of justice to frame an innocent citizen. That is particularly true when one remembers that the absolute immunity inquiry is ultimately an exercise in interpreting 42 U.S.C. § 1983. If § 1983 is construed to grant immunity for conduct so close to the core of what Congress sought to prohibit, then the forest has already been lost.

When immunity is sought, the Court has "reemphasize[d]" that its "role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice." *Malley*, 475 U.S. at 342. As this Court has previously observed, the Reconstruction Congress enacted § 1983 precisely because it could not trust States and localities to protect the constitutional rights of all citizens—particularly African-Americans—and thus intended "to 'throw open the doors of the United States courts' to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights." *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 504 (1982).

The facts of this case strike at the heart of that concern. Rather than pursuing Gates, the white

man to whom most of the actual evidence pointed, petitioners preferred to frame two innocent African-Americans. State authorities have done little to remedy petitioners' unconstitutional conduct. The 1871 Congress intended § 1983 to protect citizens from such a perversion of the judicial process by state and local actors. Section 1983 was designed to prevent the use of state actors and official machinery designed to protect citizens from being perverted into an instrument of oppression. *See Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights"). It would be a tragic inversion of Congress's intent to hold that § 1983 confers absolute immunity on petitioners.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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